TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 457.

GEORGE Q. ERSKINE, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT IN THE STATE OF WISCONSIN, PLAINTIFF IN ERROR,

vs.

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, AND BENJAMIN F. ALDRICH, DEFENDANTS IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED JANUARY 4, 1871.

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1 Circuit court of the United States of America for the eastern district of Wisconsin.

UNITED STATES of AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district, on the first Monday (being the third day) of October, A. D. 1870—

Present, the Honorable Andrew G. Miller, district judge, presiding; Charles S. Hamilton, marshal; Edward Kurtz, clerk—

Among other, the following proceedings were had, to wit:

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, & Benjamin F. Aldrich,
vs.
GEORGE Q. ERSKINE, COLLECTOR OF INTERNAL revenue for the first collection district in the State of Wisconsin.
} At law.

Be it remembered that, heretofore, to wit, on the twenty-third day of June, A. D. 1870, came the defendant, by his attorney, Mr. G. W. Hazelton, and presented to the clerk his petition in writing as herein filed, duly verified by affidavit, together with a certificate of counsel, as required by law, praying that a writ of certiorari may issue to the circuit court of Milwaukee County, in the State of Wisconsin, requiring said court to send to this court the record and proceedings in the above-entitled cause in said court, the defendant being collector of internal revenue for the first collection district in the State of Wisconsin; which petition and other papers are as follows, to wit:

Petition for writ of certiorari.

UNITED STATES OF AMERICA,
District of Wisconsin:

To the honorable the circuit court of the United States for the district of Wisconsin:

2 Your petitioner, George Q. Erskine, respectfully represents: That on the 10th day of June, 1870, in the circuit court of Milwaukee County, State of Wisconsin, an action was commenced by George T. Van Arsdale, Alvin F. Durant, and Benjamin F. Aldrich, plaintiffs, against your petitioner, defendant, by summons, a copy of which is hereto annexed and marked "A," and made a part of this petition; that no proceedings have been had in said action on the part of this defendant, and no trial had therein; that this defendant, at the time of the commencement of this action and for a long time prior thereto, hath been, and still is, the collector of internal revenue for the first collection district in the State of Wisconsin; that the said action brought by said plaintiffs against your petitioner for an alleged wrongful collection of tax of personal property belonging to the said plaintiffs. But this your petitioner states that the several acts done by this petitioner, and of which the plaintiff complains, were done by your petitioner by virtue of his office as collector, aforesaid, and under the revenue laws of the United States, and by virtue and under color thereof, and for the purpose of collecting an assessment lawfully made against

the said plaintiff under the laws of the United States, and not otherwise.

Your petitioner therefore prays that a certiorari be issued in due form of law, and that said action and the record and proceedings therein be transferred to this court.

G. Q. ERSKINE.

Subscribed & sworn to before me this 23d day of June, 1870.

EDW. KURTZ,
Clerk of U. S. Circuit, Wis.

I certify that, as counsel for the petitioner, I have examined the proceedings against him in the action above set forth, and have carefully enquired into all the matters set forth in the above petition, and that I believe the same to be true as set forth in said petition.

GEO. W. LAKIN.

Circuit court, Milwaukee County.

3 GEORGE T. VAN ARSDALE, ALVIN F. Durant, and Benjamin F. Aldrich,
against
GEORGE Q. ERSKINE, COLLECTOR OF INTERNAL revenue for the first collection district in the State of Wisconsin.

The State of Wisconsin to the above-named defendant:

You are hereby summoned, and required to answer the complaint in this action, which will be filed in the office of the clerk of the circuit court of the county of Milwaukee, at the clerk's office, in the city of Milwaukee, and to serve a copy of your answer to the said complaint on the subscribers, at their office in Mitchell's bank building, in the city of Milwaukee, and State of Wisconsin, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of two thousand eight hundred and two dollars & seventeen cents, with interest on three hundred and thirty-three dollars and eighty-seven cents of said sum, from the 28th day of June, 1867; with interest on one hundred and sixty dollars and sixty-five cents of said sum, from the 29th day of August, 1867; with interest on one hundred & fourteen dollars and sixty-five cents of said sum, from the 27th day of September, 1867; with interest on one hundred & thirty-three dollars & fifty-two cents of said sum, from the 30th day of October, 1867; with interest on one hundred & forty-three dollars & five cents of said sum, from the 29th day of November, 1867; with interest on one hundred and fifty-eight dollars and sixty-five cents of said sum, from the 30th day of December, 1867; with interest on one thousand and eighty-nine dollars and thirty-eight cents of said sum, from the 28th day of January, 1868; with interest on one hundred and fifty-six dollars and thirty-nine cents of said sum from the 27th day of February, 1868, and with interest on five hundred and twelve dollars & one cent of said sum, from the 28th day of April,
4 1868, besides the costs of this action.

Dated Milwaukee, June 9th, 1870.

JOHN W. & A. L. CARY,
Plaintiffs' Attorneys Milwaukee, Wis.

I hereby certify that the within is a true copy of the original summons in this action and that I served same on defendant June 10th, 1870.

ALFRED L. CARY.

Whereupon a writ of certiorari issued in duplicate as follows, to wit:

Certiorari.

THE UNITED STATES OF AMERICA,
District of Wisconsin, ss:

[SEAL.] The President of the United States of America to the circuit court for Milwaukee County, in the State of Wisconsin, greeting:

Whereas George Q. Erskine, collector of internal revenue for the first collection district in the State of Wisconsin, defendant in a certain cause in said circuit court, wherein George T. Van Arsdale, Alvin F. Durant, & Benjamin F. Aldrich, are plaintiffs, pursuant to section sixty-seven of an act of Congress, entitled "An act to declare the meaning of certain parts of the internal revenue act, approved June 30, 1864, and for other purposes," approved July 13, 1866, has this day presented to the clerk of the circuit court of the United States for the district of Wisconsin, his petition duly verified by affidavit, together with a certificate signed by an attorney of the circuit court of the United States for this district, setting forth that, as counsel for the petitioner, he has examined the proceedings against him, and carefully enquired into all the matters set forth in the petition, and that he believes the same to be true.

Therefore you are hereby commanded that you send the record and proceedings in said cause, wherein George T. Van Arsdale, Alvin F. Durant, and Benjamin F. Aldrich, are plaintiffs, and George Q. Erskine, collector of internal revenue for the first collection district in the State of Wisconsin, is defendant, to the said circuit court of the
5 United States for the district of Wisconsin, without delay.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in said district of Wisconsin, this twenty-third day of June, in the year of our Lord one thousand eight hundred and seventy, and of our independence the 94th.

EDWARD KURTZ,
Clerk of the Circuit Court of the United States for the District of Wisconsin.

Return.

Certiorari returned. Served by delivering, personally to James Hickox, clerk of the circuit court of Milwaukee County, a duplicate original of this writ on the 28th day of June, 1870.

Fees, $2 06.

C. S. HAMILTON, *Marshal.*

JULY 16, 1870.—Record and proceedings in the circuit court for Milwaukee County, duly certified by the clerk of said court as his return to the writ of certiorari, with duplicate certiorari annexed thereto, filed as follows:

Certified record from State court.—(Duplicate.)

THE UNITED STATES OF AMERICA,
District of Wisconsin, ss :

[SEAL.] The President of the United States of America to the circuit court for Milwaukee County, in the State of Wisconsin, greeting:

Whereas George Q. Erskine, collector of internal revenue for the first collection district in the State of Wisconsin, defendant in a certain cause in said circuit court, wherein George T. Van Arsdale, Alvin F. Durant, & Benjamin F. Aldrich are plaintiffs, pursuant to section sixty-seven of an act of Congress entitled "An act to declare the meaning of certain parts of the internal revenue act, approved June 30, 1864, and for other purposes," approved July 13, 1866, has this day presented to the clerk of the circuit court of the United States, for the district of Wisconsin, his petition, duly verified by affidavit, together with a certificate signed by an attorney of the circuit court of the United States for this district,
6 setting forth that, as counsel for the petitioner he has examined the proceedings against him, and carefully enquired into all the matters set forth in the petition, and that he believes the same to be true.

Therefore you are hereby commanded that you send the record and proceedings in said cause, wherein George T. Van Arsdale, Alvin F. Durant, and Benjamin F. Aldrich are plaintiffs, and George Q. Erskine, collector of internal revenue for the first collection district in the State of Wisconsin, is defendant, to the said circuit court of the United States for the district of Wisconsin, without delay.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in said district of Wisconsin, this twenty-third day of June, in the year of our Lord one thousand eight hundred and seventy, and of our independence the 94th.

EDWARD KURTZ,
Clerk of the Circuit Court of the United States for the District of Wisconsin.

(Indorsed :) 112 law docket C., U. S. circuit court, Wisconsin. George T. Van Arsdale, Alvin F. Durant, & Benjamin F. Aldrich, vs. George Q. Erskine, collector of internal revenue for the first collection district in the State of Wisconsin. Duplicate certiorari. Received June 28, 1870, and filed July 5, 1870. Hickox, clerk.

Return of clerk cir. c't Milwaukee Co., to writ of certiorari.

Pleas before the honorable D. W. Small, judge of the second judicial circuit of the State of Wisconsin, and presiding judge of the circuit court within and for the county of Milwaukee, in said State, at a term of said court begun and held at the court-house in the city of Milwaukee, on the fourth Monday of June, A. D. 1870.

JAMES HICKOX, *Clerk.*

GUSTAV BRUNST, Esqr., *Sheriff.*

7 GEORGE T. VAN ARSDALE, ALVIN F. Durant, and Benjamin F. Aldrich,
against
GEORGE Q. ERSKINE, COLLECTOR OF INTERNAL revenue for the first collection district in the State of Wisconsin.

Be it remembered that, heretofore, to wit, on the 5th day of July, A. D. 1870, came the said plaintiffs, by their attorneys, and filed in the office of the clerk of the court aforesaid, their certain summons and affidavit of service thereof, in the words and figures following, to wit:

Circuit court Milwaukee County.

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, and Benjamin F. Aldrich,
against
GEORGE Q. ERSKINE, COLLECTOR OF INTERNAL revenue for the first collection district in the State of Wisconsin.

The State of Wisconsin to the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the circuit court of the county of Milwaukee, at the clerk's office in the city of Milwaukee, and to serve a copy of your answer to the said complaint on the subscribers at their office in Mitchell's bank building, in the city of Milwaukee and State of Wisconsin, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of two thousand eight hundred and two dollars and seventeen cents, with interest on three hundred and thirty-three dollars and eighty-seven cents of said sum, from the 28th day of June, 1867; with interest on one hun-
8 dred and sixty dollars and sixty-five cents of said sum, from the 29th day of August, 1867; with interest on one hundred and fourteen dollars and sixty-five cents of said sum, from the 27th day of September, 1867; with interest on one hundred and thirty-three dollars and fifty-two cents of said sum, from the 30th day of October, 1867; with interest on one hundred and forty-three dollars and five cents of said sum, from the 29th day of November, 1867; with interest on one hundred and fifty-eight dollars and sixty-five cents of said sum, from the 30th day of December, 1867; with interest on one thousand and eighty-nine dollars and thirty-eight cents of said sum, from the 28th day of January, 1868; with interest on one hundred and fifty-six dollars and thirty-nine cents of said sum, from the 27th day of February, 1868; and with interest on five hundred and twelve dollars and one cent of said sum, from the 28th day of April, 1868, besides the costs of this action.

JOHN W. & A. L. CARY,
Plaintiff's Attorneys, Milwaukee, Wis.

STATE OF WISCONSIN,
County of Milwaukee, ss:

Alfred L. Cary, being duly sworn, deposes and says that, on the 10th day of June, A. D. 1870, at the city of Milwaukee, in the county of Milwaukee, and State of Wisconsin, he served the within summons upon the within defendant, George Q. Erskine, by delivering to him personally, and leaving with him a true copy thereof; that he knew the person so served with said summons to be the same George Q. Esrkine named as defendant therein; deponent further says that he endorsed upon the copy of summons which he delivered to the said defendant as aforesaid, the following words, to wit: "I hereby certify that the within is

a true copy of the original summons in this action, and that I served same on defendant June 10th, 1870. Alfred L. Cary."

ALFRED L. CARY.

Sworn to before me this 10th day of June, 1870.

GEO. COGSWELL,
Notary Public Mil. Co., Wis.

9 Same day, to wit, July 5, 1870, duplicate writ of certiorari to the circuit court of the United States for the district of Wisconsin was filed.

STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

I, James Hickox, clerk of said court, do hereby certify that I have compared the foregoing copy with the original record and proceedings entered in the action therein entitled; that it is a correct transcript therefrom, and of the whole thereof, as the same remains of record in my office; and I return, hereto annexed, the duplicate writ of certiorari issued out of the circuit court of the U. S. for the district of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 7th day of July, A. D. 1870.

[SEAL.] JAMES HICKOX, *Clerk.*

(Indorsed:) 112 law docket, C. circuit court, Milwaukee County. George T. Van Arsdale et als. vs. George Q. Erskine, collector, &c. Return to writ of certiorari. Filed July 16, 1870. Ed'w Kurtz, clerk.

AUGUST 1, 1870.—This day came the plaintiffs, by their attorneys, and filed their declaration as follows, to wit:

Declaration.

Circuit court of the United States for the eastern district of Wisconsin, of the first Monday of August, A. D. 1870.

EASTERN DISTRICT OF WISCONSIN, *ss:*

George T. Van Arsdale, Alvin F. Durant, and Benjamin F. Aldrich, partners in business, under the name and style of "Durant, Van Arsdale & Co.," and who are citizens of the State of Wisconsin, by John W. & A. L. Cary, their attorneys, complain of George Q. Ers-
10 kine, collector of internal revenue for the first collection district in the State of Wisconsin, of a plea of trespass on the case upon promises.

For that whereas the said plaintiffs heretofore, to wit, from the first day of March, A. D. 1867, to the first day of April, A. D. 1868, at the city of Kenosha, in said eastern district of Wisconsin, being manufacturers of thimble-skeins and pipe-boxes from cast iron, had manufactured a large quantity, to wit, 934 $\frac{112}{2000}$ tons of cast-iron thimble-skeins and pipe-boxes, to wit, at their certain manufactory in the said city of Kenosha, in the county of Kenosha, and State of Wisconsin. And whereas the said defendant, during all that time, and up to and at the time of the payments to said defendant hereinafter mentioned, held the office and exercised the duties of collector of internal revenue of the United States for the first collection district, in said State of Wisconsin; and whereas the assessor of internal revenue of the United States for

said district assessed on said plaintiffs in respect to the said thimble-skeins and pipe-boxes so manufactured by them as aforesaid, a pretended tax, to wit, of three dollars for each and every ton of two thousand pounds, which said tax so assessed amounted to a great sum of money, to wit, to the sum of two thousand eight hundred and two dollars and seventeen cents, whereas in truth and in fact the said thimble-skeins and pipe-boxes so manufactured by said plaintiffs as aforesaid, were by law exempt from said tax or any tax to the said United States; and the plaintiffs aver that they protested against the imposition and payment of said pretended tax; and whereas said plaintiffs afterwards, at various dates and times, and at the district aforesaid, were compelled to, and did, pay to said defendant, under protest, the said pretended and illegal tax of two thousand eight hundred and two dollars and seventeen cents, so as aforesaid assessed upon said plaintiffs in respect to the said thimble-skeins and pipe-boxes so manufactured by them as aforesaid, which said payments were made at the times and in the sums following, to wit: On the 28th day of June,
11 A. D. 1867, the sum of three hundred and thirty-three dollars and eighty-seven cents; on the 29th day of August, A. D. 1867, the sum of one hundred and sixty dollars and sixty-five cents; on the 27th day of September, A. D. 1867, the sum of one hundred and fourteen dollars and sixty-five cents; on the 30th day of October, A. D. 1867, the sum of one hundred and thirty-three dollars and fifty-two cents; on the 29th day of November, A. D. 1867, the sum of one hundred and forty-three dollars and five cents; on the 30th day of December, A. D. 1867, the sum of one hundred and fifty-eight dollars and sixty-five cents; on the 28th day of January, A. D. 1868, the sum of one thousand and eighty-nine dollars and thirty-eight cents; on the 27th day of February, A. D. 1868, the sum of one hundred and fifty-six dollars and thirty-nine cents; and on the 28th day of April, A. D. 1868, the sum of five hundred and twelve dollars and one cent. And whereas afterwards, to wit, on or about the 14th day of July, A. D. 1869, said plaintiffs made an appeal to the Commissioner of Internal Revenue of the United States from the said erroneous and illegal assessment upon, and collection of, said plaintiffs, of said pretended tax, which said appeal was made according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury, established in pursuance thereof, and by which said appeal said plaintiffs claimed and demanded that said Commissioner of Internal Revenue should remit, refund, and pay back to said plaintiffs the taxes so as aforesaid erroneously and illegally assessed upon and collected of said plaintiffs; that said Commissioner of Internal Revenue entertained said appeal, and on or about the 28th day of April, A. D. 1870, decided the same adversely to said plaintiffs. And whereas this suit was brought by said plaintiffs against said defendant within six months from the time of the decision of said Commissioner of Internal Revenue upon said appeal, by means of which said several premises the said defendant then and there became liable to reimburse and pay back to said plaintiffs the said sum of money, to wit, the sum of two thousand eight hundred and two dollars and seventeen cents, which said plaint-
12 iffs had, so as aforesaid, been compelled to, and did, pay to said defendant, under protest, for the said pretended and illegal tax so as aforesaid assessed upon said plaintiffs in respect to the said thimble-skeins and pipe-boxes so manufactured by them as aforesaid; and being so liable he, the said defendant, in consideration thereof, afterwards, to wit, on the first day of May, A. D. 1870, at the eastern dis-

trict of Wisconsin aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay them the said last-mentioned sum of money when he, the said defendant, should be thereunto afterwards requested. Yet the said defendant, although often requested, &c., hath not yet paid the said sum of money last above mentioned, or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant hath hitherto altogether refused, and still does refuse.

And for that whereas also, the said plaintiffs heretofore, to wit, from the first day of March, A. D. 1867, to the first day of April, A. D. 1868, at the said city of Kenosha, in said eastern district of Wisconsin, being manufacturers of thimble-skeins and pipe-boxes from cast iron, had manufactured a large quantity of cast iron thimble-skeins and pipe-boxes, to wit, at their certain manufactory in the said city of Kenosha, in the county of Kenosha, and State of Wisconsin; and whereas the said defendant, during all that time, and up to and at the time of the payments to said defendant hereinafter mentioned, held the office and exercised the duties of collector of internal revenue of the United States for the first collection district, in said State of Wisconsin; and whereas the assessor of internal revenue of the United States for said district assessed on said plaintiffs in respect to the said thimble-skeins and pipe-boxes so manufactured by them, as aforesaid, a pretended tax, to wit, the sum of two thousand eight hundred and two dollars and seventeen cents, whereas in truth and in fact the said thimble-skeins and pipe-boxes so manufactured by said plaintiffs as aforesaid, were, by law, exempt from said tax, or any tax to the
13 said United States, and the plaintiffs aver that they protested against the imposition and payment of said pretended tax; and whereas said plaintiffs afterwards, at various dates and times, and at the district aforesaid, were compelled to, and did, pay to said defendants, under protest, the said pretended and illegal tax of two thousand eight hundred and two dollars and seventeen cents so as aforesaid assessed upon said plaintiffs in respect to the said thimble-skeins and pipe-boxes so manufactured by them as aforesaid, which said payments were made at the times and in the sums following, to wit: On the 28th day of June, A. D. 1867, the sum of three hundred and thirty-three dollars and eighty-seven cents; on the 29th day of August, A. D. 1867, the sum of one hundred and sixty dollars and sixty-five cents; on the 27th day of September, A. D. 1867, the sum of one hundred and fourteen dollars and sixty-five cents; on the 30th day of October, A. D. 1867, the sum of one hundred and thirty-three dollars and fifty-two cents; on the 29th day of November, A. D. 1867, the sum of one hundred and forty-three dollars and five cents; on the 30th day of December, A. D. 1867, the sum of one hundred and fifty-eight dollars and sixty-five cents; on the 28th day of January, A. D. 1868, the sum of one thousand and eighty-nine dollars and thirty-eight cents; on the 27th day of February, A. D. 1868, the sum of one hundred and fifty-six dollars and thirty-nine cents; and on the 28th day of April, A. D. 1868, the sum of five hundred and twelve dollars and one cent; and whereas afterwards, to wit, on or about the 14th day of July, A. D. 1869, said plaintiffs made an appeal to the Commissioner of Internal Revenue of the United States from the said erroneous and illegal assessment upon, and collection of, said plaintiffs of said pretended tax, which said appeal was made according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and by which said appeal said plaintiffs claimed and de-

manded that said Commissioner of Internal Revenue should remit, refund, and pay back to said plaintiffs the taxes so as aforesaid
14 erroneously and illegally assessed upon, and collected of, said plaintiffs; that said Commissioner of Internal Revenue entertained said appeal, and, on or about the 28th day of April, A. D. 1870, decided the same adversely to said plaintiffs. And whereas this suit was brought by said plaintiffs against said defendant within six months from the time of the decision of said Commissioner of Internal Revenue upon said appeal, by means of which said several premises the said defendant then and there became liable to reimburse and pay back to said plaintiffs the said sum of money, to wit, the sum of two thousand eight hundred and two dollars and seventeen cents, which said plaintiffs had so as aforesaid been compelled to, and did pay to said defendant, under protest, for the said pretended and illegal tax so as aforesaid assessed upon said plaintiffs in respect to the said thimble-skeins and pipe-boxes so manufactured by them as aforesaid; and being so liable he, the said defendant, in consideration thereof, afterwards, to wit, on the first day of May, A. D. 1870, at the eastern district of Wisconsin aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay them the said last-mentioned sum of money when he, the said defendant, should be thereunto afterwards requested. Yet the said defendant, although often requested, &c., hath not yet paid the said sum of money last above mentioned, or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant hath hitherto altogether refused, and still does refuse.

15 And for that whereas the said defendant, on the first day of May, in the year one thousand eight hundred and seventy, at the said eastern district of Wisconsin, was indebted to the said plaintiffs in the sum of five thousand dollars, lawful money of the United States of America, for the work and labor, care and diligence of the said plaintiffs by the said plaintiffs before that time done, performed, and bestowed in and about the business of the said defendant, and for the said defendant, and at the special instance and request of the said defendant, and also for divers materials and other necessary things by the said plaintiffs found, provided, used, and applied in and about that work, at the special instance and request of the said defendant; and being so indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiffs had before that time, at the like special instance and request of the said defendant done, performed, and bestowed divers other work and labor, care, and diligence in and about the business of the said defendant, and for the said defendant, and had before that time found, provided, used, and applied divers other materials and other necessary things in and about that business, the said defendant then and there undertook and faithfully promised the said plaintiffs that the said defendant would well and truly pay the said plaintiffs so much money as the said plaintiffs reasonably deserved to have of the said defendant for the same when the said defendant should be thereunto afterwards requested; and the said plaintiffs aver that the said plaintiffs therefore reasonably deserve to have of the said defendant for the same

the further sum of five thousand dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, had notice. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiffs in the sum of five thousand dollars, of like lawful money as aforesaid, for divers goods, wares, and merchandise by the said plaintiffs before that time sold and delivered to the said defendant, and at the like request of the said defendant; and in the further sum of five thousand dollars of lawful money as aforesaid, for so much money before that time lent and advanced by the said plaintiffs to the said defendant, and at the like request of the said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers others sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there found to be in arrear and indebted to the said plaintiffs in the further sum of five thousand dollars of like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant, although often requested, &c., has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiffs of five thousand dollars, and therefore the said plaintiffs bring suit, &c.

JOHN W. & A. L. CARY,
Plaintiffs' Attorneys.

16 And same day plaintiffs' attorneys entered in the order & rule book the following rule, to wit:

Rule to plead.

Of the first Monday of August, A. D. 1870.

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, and Benjamin F. Aldrich,
vs.
GEORGE Q. ERSKINE, COLLECTOR OF INTERNAL revenue, &c.

On motion of John W. & A. L. Cary, plaintiffs' attorneys, ordered

that the defendant plead to the plaintiffs' declaration, on file, by the first Monday of September next, or his default will be entered.

JOHN W. & A. L. CARY,
Plaintiffs' Attorneys.

AUGUST 2, 1870.—This day came the defendant, by his attorney, Mr. G. W. Hazelton, and filed his plea, as follows:

Plea.

Circuit court of the United States, eastern district of Wisconsin.

GEORGE Q. ERSKINE
ads.
GEORGE T. VAN ARSDALE ET ALS.

And now comes the defendant, by G. W. Hazelton, his attorney, and defends the wrong and injury, when, &c., and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and of this he puts himself upon the country, &c.

By G. W. HAZELTON,
Def't's Atty.

And now, at this same term, to wit, October term, A. D. 1870, and on the forty-first day thereof, to wit, on the twenty-fifth day of November, A. D. 1870—

Present, the Honorable Andrew G. Miller, district judge, presiding—

The following proceedings were had, to wit:

17 GEORGE T. VAN ARSDALE, ALVIN F. DURANT, & Benjamin F. Aldrich,
vs.
GEORGE Q. ERSKINE, COLLECTOR OF INTERNAL revenue for the first collection district in the State of Wisconsin. } At law.

Trial.

This day came the parties, by their counsel, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit: James Siddell, Enos Gay, James R. Morris, William Langton, George K. Gregory, George Bowman, Peter Martineau, Thomas J. Freeman, Samuel Hayt, M. C. Cook, Isaac Selleck, and Frederick Wardner, twelve free, honest, and lawful men of the district, who were severally sworn and empanneled, and, the trial not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the forty-second day of said term, to wit, on the twenty-sixth day of November, A. D. 1870, the following proceedings were had, to wit:

Verdict.

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, & Benjamin F. Aldrich,
vs.
GEORGE Q. ERSKINE, COLLECTOR OF INTERNAL revenue for the 1st coll'n dist. in the State of Wisconsin.
} At law

This day came the parties, by their counsel, and the trial of the issue herein was resumed; and the jurors of the jury aforesaid being charged by the court on their said oaths, respectively, do say that the defendant did assume and promise, in manner and form as the plaintiffs have herein declared, against him, and assess the damages to the said plaintiffs at the sum of three thousand three hundred and seventy-two dollars and fifty-eight cents.

18 And afterwards, to wit, on the forty-fourth day of said term, to wit, on the twenty-ninth day of November, A. D. 1870, the following proceedings were had, to wit:

Judgment.

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, & Benjamin F. Aldrich,
vs.
GEORGE Q. ERSKINE, COLLECTOR OF INTERNAL revenue for the 1st coll'n dist. in the State of Wisconsin.
} At law.

This day came the plaintiffs, by their counsel, and no motion for a new trial being filed, it is considered and adjudged by this court now here that the said plaintiffs do have and recover of the said defendant, George Q. Erskine, the sum of three thousand three hundred and seventy-two dollars and fifty-eight cents damages, so as aforesaid assessed by the jury, together with fifty-seven dollars and twenty-two cents, their costs about their said suit in this behalf by them expended, and that they have execution therefor.

Judgment-roll signed November 29th, A. D. 1870.

Damages, $3,372 58; costs, 57 22—$3,429 80.

EDWARD KURTZ, *Clerk.*

Judgment-roll filed November 29, A. D. 1870, at 5 o'clock p. m.

EDWARD KURTZ, *Clerk.*

DECEMBER 3, 1870.—Stipulation of the parties filed as follows, to wit:

Stipulation as to writ of error directed by Sec'y of Treas'y.

United States circuit court for the eastern district of Wisconsin.

GEORGE T. VAN ARSDALE ET AL.
vs.
GEORGE Q. ERSKINE.

It is agreed by and between the parties hereto that the U. S.

Secretary of the Treasury has directed that a writ of error be brought to the Supreme Court of the United States to procure a review of the judgment entered in the above cause in favor of the plaintiffs against the defendant.

Dated Dec. 3, 1870.

JOHN W. & A. L. CARY,
Pltf's Att'ys.
CARPENTER & MURPHY,
Att'ys for Defendant.

DECEMBER 8, 1870.—Bill of exceptions signed and filed as follows, to wit:

Bill of exceptions.

Circuit court of the United States for the eastern district of Wisconsin.

GEORGE T. VAN ARSDALE ET ALS.
vs.
GEORGE Q. ERSKINE.
} At law.—Nov. 25, 1870.

This day came the parties, by their counsel, and the issue herein came on to be tried, whereupon a jury was called to try the same, who were severally sworn and empannelled, and charged by the court.

And at the trial of said suit—on the 25th day of November, 1870, commenced and thence continued till the 26th day of said month—before the said court and jury, the Honorable A. G. Miller, district judge for said district, present and presiding, the following proceedings were had, to wit: Carys & Cottrill appeared as counsel for plaintiffs, and G. W. Lakin and N. S. Murphey for defendant.

Defendant's counsel objects to all evidence on the part of the plaintiffs for the reason that, upon the plaintiffs' declaration, it is apparent that no cause of action is stated therein, and that upon the pleadings and the whole case as it stands, it is apparent that the plaintiffs cannot
20 recover against the defendant. Objection overruled. Exception taken.

And the plaintiffs to maintain said issue on their part called as a witness—

LORENZO JANES, who, being sworn, testified as follows:

Q. Who was collector of internal revenue for the first district of Wisconsin for the years 1867 and 1868?

A. George Q. Erskine.

Q. The defendant here?

A. Yes, sir.

Q. Were you, during these years, his deputy for the counties of Racine and Kenosha?

A. Yes, sir; in 1867 and 1868. I think my appointment commenced in April, 1867; it is my impression the 22d of April.

Q. And you have been so ever since?

A. Yes, sir.

Q. And the county and city of Kenosha are in your district, are they?

A. Yes, sir.

Q. Have you collected internal revenue tax of the plaintiffs Durant, Van Arsdale & Co., at Kenosha?

A. I have.

Q. Look at those receipts; are these receipts now shown to you severally the receipts given by George Q. Erskine, by you, as his deputy, for taxes received of the plaintiffs?

A. They are.

Q. Was the tax received as specified in these receipts?

A. Yes, sir.

Q. By whom was this tax paid to you; that is, who personally paid them?

A. Well, they were not all paid by the same individual.

Q. Did Mr. Van Arsdale here pay a portion of them?

A. He did.

Q. And the other partners paid some of them?

A. Yes, sir; his partner paid me a part of them.

Q. State whether, at the time of making these payments, they protested that it was unjust, and should not be taxed.

(Objected to.)

By the COURT. State what was said.

21 Q. Did Van Arsdale make the first payment to you himself?

A. It is impossible for me to recollect who made the first payment. Mr. Van Arsdale made a payment to me, but which of those payments I cannot recollect.

Q. Can you tell what he said to you at the time that he made the payments?

A. At the time he made me one of those payments, he stated the tax was unjust.

Q. Did he say that he ought not to be compelled to pay it?

(Objected to.)

By the COURT. Give what he said.

A. He said the tax was unjust, and that he should take steps to recover it back—that tax, together with some that he had previously paid. That was his statement.

Q. Did Mr. Durant pay you some portion of this?

A. He did.

Q. Do you recollect what Mr. Durant said at the time of making the payment?

A. He said—I think the expression, as near as I can recollect it, when he paid me some of these—I cannot recollect which one—that "this is stealing," or "no better than stealing," perhaps.

Q. The expression was used, "This is stealing, or nothing better than stealing."

A. Yes, sir.

Q. Where were those payments made?

A. Made in the office of the plaintiffs in Kenosha.

Q. Did you, as the deputy collector of internal revenue, go there to make the collection?

A. Yes, sir.

Q. Did you, as such deputy collector, demand the payment of the amount of them?

A. Yes, sir; I went in with the receipts in my hand, and asked them for the tax—for the money on that tax.

Q. You gave them to understand who you were, did you?

A. Yes, sir. Well, there was nothing said about that; they had previously received a notice that I was. When I went there, there was no questions asked as to whether I was deputy or not.

Q. What had you done before on that subject?

22 A. I had served them notice that I should be there on such a day to collect such a tax, stating the tax.

Q. Did that notice specify under certain penalties, or what did it state? (Objected to.)

Q. Was the notice, the one that you sent them, signed by you as deputy collector?

A. No, sir They are made out and signed here by the collector, and sent to me at Racine, mailed to the individuals taxed.

Q. And you sent such notices as the collector sent to you?

A. Yes, sir.

Q. Did he state how the payment must be made? (Objected to, on the ground that the notice must be produced.)

Q. State whether the notice was a printed notice or written.

A. Partly printed and partly written.

Q. Signed by whom?

A. George Q. Erskine, collector.

Q. State whether it was in the usual form—the notice of that kind from the collector's office.

A. Yes, sir; it was in the usual form.

Q. Prior to making these calls for these payments, state whether in all the instances you had sent this written demand.

A. Yes, sir.

By the COURT: You sent them by mail?

A. Yes, sir.

Q. How long before you called?

A. Well, the usual time.

By the COURT: That is not material.

Mr. CARY. We offer those receipts in evidence.

(Objected to as incompetent, and that they are not evidence of themselves; and at this time the evidence is incompetent, because there is no proof in the case of the assessment.

Objection overruled. Exception taken.)

And thereupon said receipts were read in evidence, and were as follows, to wit:

No. 1.] UNITED STATES INTERNAL REVENUE,
23 COLLECTOR'S OFFICE 1ST DISTRICT OF WIS.,
June 28, 1867.

Received of Durant, Van Arsdale & Co., three hundred & thirty-three & $\frac{87}{100}$ dollars, for excise tax.

On castings not reported for March	$135 12
" " " April	97 50
" " " May	101 25
Total	$333 87

Being amount assessed on May list for 1867.

GEO. Q. ERSKINE,
Collector,

$333 87.] Per L. JANES, *Dep.*

No. 2.] UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE 1 DISTRICT OF WIS.,
Aug'st 29, 1867.

Received of Durant, Van Arsdale & Co., one hundred & sixty-two $\frac{50}{100}$ dollars, for excise tax.

On iron m'f's	$1 85
cast'gs	160 65
Total	$162 50

Being amount assessed on list for July, 1867.

GEO. Q. ERSKINE,
Collector,

$162 50.] Per L. JANES, *Dep.*

No. 3.] UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE 1 DISTRICT OF WIS.,
Sept. 27, 1867.

Received of Durant, Van Arsdale & Co., one hundred fourteen & $\frac{65}{100}$ dollars, for excise tax on castings, ($114 65,) being amount assessed on list for August, 1867.

GEO. Q. ERSKINE,
Collector,

$114 65.] Per L. JANES, *Dep.*

No. 4.] UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE 1 DISTRICT OF WIS.,
Oct. 30, 1867.

Received of Durant, Van Arsdale dollars, for excise tax.

On castings	$132 86
Omitted on Aug. list through error	66
Total	$133 52

Being amount assessed on list for Sept'r, 1867.

GEO. Q. ERSKINE,
Collector,

$133 52.] Per L. JANES, *Dep't.*

24 No. 5.] UNITED STATES INTENAL REVENUE,
COLLECTOR'S OFFICE 1 DISTRICT OF WIS.,
Nov. 29*th*, 1867.

Received of Durant, Van Arsdale & Co., one hundred forty-three & $\frac{05}{100}$ dollars, for excise tax on castings.
Total, $143 05, being amount assessed on list for Oct. 1867.

GEO. Q. ERSKINE,
Collector,

$143 05.] Per L. JANES, *Dep.*

No. 6.] UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE 1ST DISTRICT OF WIS.,
Dec'r 30*th*, 1867.

Received of Durant & Van Arsdale, one hundred sixty-three & $\frac{15}{100}$ dollars for excise tax.

On castings	$158 65
machinery	4 50
Total	

Being amount assessed on list for Nov., 1867.

GEO. Q. ERSKINE,
Collector,

$163 15.] Per L. JANES, *Dep.*

No. 7.] UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE 1ST DISTRICT OF WISCONSIN,
January 28, 1868.

Received of Durant, Van Arsdale & Co., one thousand eighty-nine & $\frac{38}{100}$ for excise tax.

On castings for December, $65\frac{1560}{2000}$ tons, $3	$197 34
castings not reported before, for the months of M'ch, Apr'l, May, June, July, Aug., Sept., Oct., & Nov'r, 1867, as shown by statement on back of this receipt	892 04
Total	$1,089 38

Being amount assessed on list for Dec., 1867.

GEO. Q. ERSKINE,
Collector,

$1,089 38.] Per L. JANES, *Dep.*

On the back of the above receipt is found the following statement:

		No. of tons.	Rate.	Am't to tax.
For March,	1867	$37\frac{1948}{2000}$	$3	113 92
" April,	"	$26\frac{145}{2000}$	"	78 22
" May,	"	$27\frac{22}{2000}$		81 03
" June,	"	$30\frac{763}{2000}$		91 14
" July,	"	$18\frac{1241}{2000}$		55 86
" August,	"	$39\frac{1488}{2000}$		119 23
25 " September,	"	$37\frac{1647}{2000}$		113 47
" October,	"	$41\frac{1203}{2000}$		124 80
" November,	"	$38\frac{245}{2000}$		114 37
				$892 04

No. 8.] UNITED STATES INTERNAL RENENUE,
COLLECTOR'S OFFICE 1ST DISTRICT OF WIS.,
Feb'y 27, 1868.

Received of Durant & Van Arsdale one hundred & fifty-six & $\frac{39}{100}$ dollars, for excise tax on castings.

Total, $156 39, being amount assessed on monthly list for January, 1868.

GEO. Q. ERSKINE,
Collector,

$156 39.] Per L. JANES, *Dep.*

No. 9.] UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE 1ST DISTRICT OF WIS.,
Apr. 28, 1868.

Received of Durant, Van Arsdale & Co., five hundred & twelve & $\frac{01}{100}$ dollars, for excise tax.

On castings for February, $65\frac{861}{2000}$ tons	$3	$196 29
" " March, $105\frac{481}{2000}$ "	"	315 72
Total		$512 01

Being amount assessed on monthly list for March, 1868.

GEO. Q. ERSKINE,
Collector,

$512 01.| Per L. JANES, *Dep.*

Q. Look at that notice, as corrected there in pencil-mark. Is that the form of notice that was used?

A. That was the general form of the notices that are made—of course, that is the general form. The amounts and dates would vary from that.

Cross-examination:

Q. Can you examine these receipts, and tell how many of them were delivered to this gentleman, Mr. Van Arsdale, and how many of them were delivered to Mr. Durant?

A. No, sir.

Q. Can you tell what proportion of this money, represented by those nine receipts, was in fact paid by Mr. Van Arsdale?

26 A. I could not.

Q. Can you tell the number of times Mr. Van Arsdale paid you?

A. No, sir.

Q. Nor the number of times Mr. Durant paid you?

A. No, sir.

Q. Do you remember of Mr. Van Arsdale paying more than once?

A. I recollect he paid me once, and I believe he was in the office, together with his partner. He either handed me the money himself, or his partner did, I cannot state which; and I cannot tell the number of times.

Q. Have you any recollection of more than these two occasions of his being present at the time you were paid?

A. It is my impression, two or three times—that is, I have some recollection of either two or three times. It might have been more, but I cannot recollect of more than either two or three times that he was present.

Q. Whom do you think paid it the other times, when you gave those receipts?

A. Sometimes his partner, and sometimes his clerk.

Q. Who was that clerk?

A. I cannot state his name. It is a clerk that was doing business in the office.

Q. The clerk generally made these payments, as you remember; did he not?

A. I recollect that he paid several times, but I cannot say that he generally paid; but he paid more than once.

Q. Now you spoke about a conversation at the time of one of those payments, with Mr. Van Arsdale in regard to the tax; was that the only conversation that you now remember to have had with him at any time when any of those receipts were given?

A. That is the only conversation I recollect with him.

Q. Now, will you state once more what that conversation was?

A. He paid me the money on the receipts I then presented; he at

the same time stated that the assessment on the tax was wrong, and went on and gave me a full explanation of the work that was done,
27 and the tax and the law, and told the whole thing; and then made the remark that he should take steps to recover the tax back, together with the taxes that he had previously paid.

Q. That is, that he should take steps to recover the tax back that he paid you then, and that he had previously paid?

A. Yes, sir.

Q. That tax that he paid you then was represented in amount, as I understand you, by one of those receipts?

A. Yes, sir.

Q. But you cannot say which one?

A. No, sir.

Q. Can you refresh your memory so as to state now what year it was that that conversation was had?

A. Not positively; I cannot.

Q. Well, I will take your best recollection about it, please.

A. There is nothing particular that I know of to bring to my remembrance the particular time, but it must have been after a number of payments were made; and if I tell you, it would be a mere guess whether it was during the year 1867 or 1868. There is nothing from which I can recollect particularly the time each payment was made.

Q. I understand you to say that that is all the conversation you ever had with him, at the time any payment was made, upon the subject of the illegality of the tax and of his intention of seeking to recover it.

A. Yes, sir.

Q. You had a conversation at another time with Mr. Durant?

A. Yes, sir.

Q. Can you state which payment that was?

A. No, sir.

Q. Can you tell when that was?

A. No, sir.

Q. Was it at the times that money was actually paid to you?

A. Yes, sir.

Q. Now, what was that conversation?

A. Well, it was a remark by him that he—well, about the words, as I recollect them was, "that is stealing, this is a steal," or "like
28 stealing." It was but a very few words.

Q. That is all he said?

A. No, sir.

Q. Nothing was said about his intention to recover that payment back?

A. No, sir.

Q. Are you, as collector of taxes, in the habit of hearing kindred remarks of that kind frequently?

A. Yes, sir.

Q. And of parties whom, to your knowledge. never sought to recover any tax back?

A. Yes, sir.

Q. I want to enquire of you, as deputy collector, whether it is not usual practice, for parties protesting against payment of a tax, for you to make a memorandum in writing, upon the receipt, or some other paper, at the time of the payment?

(Objected to as immaterial. Objection overruled. Exception taken.)

A. I have generally, and I think always, when they have paid it saying, "I pay this under protest." I write across it "Paid under protest.

Q. Whereabouts on the receipt would you write it?
A. Right across the receipt.
Q. On the face of it?
A. Yes, sir; I think so.
Q. What would you write there?
A. "Paid under protest." I know a number of instances where I have done that.
Q. State whether you understood this conversation between you and Mr. Durant to be intended as a protest at the time.
(Objected to. Objection overruled. Exception taken.)
A. Well, it would be merely my own inference from the statement that they made. Of course I did not understand that they paid it willingly, when he said it was stealing, or when he said that the tax was wrong, and that he should take steps to recover it back. Whether you call that protesting or not, I do not know; but it would be my inference.
29 Q. State whether all the sums represented by those several receipts were paid to you personally, as deputy collector.
A. Yes, sir.

Re-direct examination:

Q. Do you recollect the occasion of the assessment coming, which was the January payment, I believe, for the seven or eight months' assessment of that thimble-skein—a payment amounting to over a thousand dollars?
A. I remember of collecting a tax of about a thousand dollars.
Q. Do not you recollect that it was when you collected that tax that Mr. Durant made his statement to you that it was no better that stealing?
A. No, sir; I cannot state; I can't recollect whether it was that particular payment or not.
Q. Now, in regard to the payments, you say they were made in the office of Durant, Van Arsdale and Company?
A. Yes, sir.
Q. Was not it usually the case that, when you say the clerk was in there, that Durant and Van Arsdale, one or both of them, were there with him?
A. Well, at times, they were, but sometimes not; but generally I think they were.
Q. You received this money by check, didn't you?
A. Yes, sir; usually; I think always; but it is possible that sometimes they gave me currency.
Q. Do you know whose handwriting the check was in?
A. No, sir.
Q. The office is a small one, is it, where they are—all over near together when they are in there?
A. Yes, sir.
Q. Did you understand, and they understand, that all these taxes were for the same matter—some claim—I mean all for castings of that description?
A. The taxes were all for castings.
30 Q. Did you understand it to be for that particular kind of castings?
A. I never scrutinized the receipts to see what it is for. I merely look at the amount.

And thereupon said plaintiff to further maintain said issue on their part called as a witness—

O. C. MASON, who, being sworn, testified as follows:

Q. What office are you in?

A. I am clerk in the assessor's office. I am assistant assessor also, but not acting at present.

Q. The assessor's office for the first district of Wisconsin?

A. Yes, sir.

Q. Those books you have here are a portion of the assessment books are they?

A. Yes, sir.

Q. Turn to the assessment for May list, 1867, against Durant, Van Arsdale & Co.

(Objected to.)

Q. You have charge and custody of the office to-day, have you?

A. Yes, sir.

Q. And you are the only person there yourself?

A. Yes, sir. I was the only person there at the time I left.

(Objected to. Objection overruled. Exception taken.)

Q. Look at the May list for 1867; what do you find there against Durant, Van Arsdale & Co.?

A. Page ten.

By the COURT: Stop a moment.

Q. That is the list for May, 1867, is it?

A. Yes, sir.

Q. For what part?

A. Division four, Kenosha County; alphabetical list of Kenosha County.

Q. State what you find there.

A. I find that Durant, Van Arsdale & Co., were assessed on castings not reported for the month of March, 1867, $135 12 on $45\frac{142}{2000}$ tons, at $3 00 per ton; for the month of April, not before reported, $32\frac{500}{2000}$ tons, at $3 00 per ton, making $97 50; for the month of May, $33\frac{750}{2000}$ tons, at $3 00 per ton, $101 25; total, 333 87, on that assessment on that May list. I find on the July list for 1867, an assessment against Durant, Van Arsdale & Co., castings for June, $34\frac{3}{4}$ tons, at $3 00 per ton, $104 25; same list, castings for July, $18\frac{1600}{2000}$ tons, at $3 00 per ton, $56 40; total, $160 65. For the months of August the same year, I find Durant, Van Arsdale & Co. are assessed on castings not exempt, $38\frac{437}{2000}$, at $3 00 per ton, $114 65; for the month of September, the same year, I find an assessment against Durant, Van Arsdale & Co., for castings not exempt, $44\frac{574}{2000}$ tons, at $3 00 per ton, $132 86; on the same list and same month I find them assessed, amount in August last, uncollected through error, 66 cents; total, $133 52. In the October list for the same year, I find Durant, Van Arsdale & Co., assessed on castings not exempt, $47\frac{1365}{2000}$ tons, at $3 00 per ton, $143 05; for the month of November, same year, I find Durant, Van Arsdale & Co., assessed on castings not exempt, $52\frac{1766}{2000}$ tons, at $3 00 per ton, $158 65; for the month of December, same year, I find Durant, Van Arsdale & Co., assessed on castings not exempt, $65\frac{1560}{2000}$, at $3 00 per ton, $197 34; same list, castings not reported for the month of March, 1867, $37\frac{1948}{2000}$ tons, at $3 00 per ton, $113 92; same list, castings not reported for the month of April, 1867, $26\frac{145}{2000}$, at $3 00 per ton, $78 22; same list, castings not reported for the month of May, 1867, $27\frac{22}{2000}$, at $3 00 per ton, $81 03; same list, castings not reported for the month of June, 1867, $30\frac{765}{2000}$, at $3 00 per ton, $91 14; same list, castings not reported in the month of July, 1867, $18\frac{1241}{2000}$, at $3 00 per ton, $55 86; castings not reported for the month of August, 1867, $39\frac{1488}{2000}$ tons, at

$3 00 per ton, $119 23; castings not reported for the month of September, 1867, $37\frac{1647}{2000}$ tons, at $3 00 per ton, $113 47; castings not reported for the month of October, 1867, $41\frac{1200}{2000}$ tons, at $3 00 per ton, $124 80; castings not reported for the month of November, 1867,
32 $38\frac{245}{2000}$ tons, at $3 00 per ton, $114 37, making a total of $1,089 38.

Q. What is the next month?

A. For the month of January, 1868, I find assessed against Durant, Van Arsdale & Co., on castings not exempt, $52\frac{259}{2000}$ tons, at $3 00 per ton, $156 39; and for the month of March, 1868, (there being nothing in February,) I find assessed against Durant, Van Arsdale & Co., on castings not exempt, for the month of February, $65\frac{861}{2000}$ tons, at $3 00 per ton, $196 29; and for the month of March, on the same list, castings not exempt for the month of March, $105\frac{481}{2000}$ tons, at $3 00 per ton, $315 72, making a total of $512 01.

Cross-examination waived.

And said plaintiffs, to further maintain said issue on their part, called as a witness—

GEORGE T. VAN ARSDALE, who, being sworn, testified as follows:

Q. You are one of the plaintiffs in this case, are you?

A. Yes, sir.

Q. You have charge of the financial affairs of Durant, Van Arsdale & Co.?

A. Yes, sir.

Q. You heard the assessor this morning read the assessment from the assessment book, did you?

A. Yes, sir.

Q. What articles of castings was it that was assessed?

A. Thimble-skeins and pipe-boxes—the sample which is there.

Q. Anything else?

A. No, sir; not as they returned; the balance was separated. The returns in each case were made by me.

Q. How came you to make these returns?

A. I made them because I was required to by our local assessor. The returns—we are generally required to make them the first ten days of the month, for the previous month, and when April came he told me that the present law exempted us from any taxation whatever.

By the COURT: Just stop a moment.

33 Q. That was April, 1867?

A. Yes, sir; and then about the last of May. I do not remember the date. He then informed me that the first of June he would require me to pay a tax, as the Commissioner had decided about the 15th of the month that we were still taxable, and I must go back and return for the last three months.

By Mr. MURPHEY: When was this last conversation?

A. The last of May; the returns were made within the first ten days of June. That was what we always had to do.

Q. He told you you must return for three months prior?

A. Yes, sir; when the new law went into operation, as we had made no returns prior on the thimble-skeins, I then returned for the three previous months the thimble-skeins alone, that is, I made other returns on them.

Q. Well, so far as this matter is concerned.

A. Yes, sir; I returned the thimble-skeins alone, but not the boxes.

Q. From that time you continued to return in that way for how long?

A. Until in January. I would state here that before I made the returns then, I came up to see the assessor. Colonel Bingham, his assistant, was in at the time. Captain Mason, who is since dead, and he instructed me that the whole decision was wrong, and that I need not return on the boxes; that the question could be determined on the skeins; and further, I consulted with General Wallace, in Chicago then, in January, commencing in December, before the return was made in January. Then our local assessor required me to go back for the previous nine months and return the boxes, which I done.

Q. And from that on until the close of March or first of April, you returned what?

A. Both thimble-skeins and boxes.

Q State whether those returns were made in pursuance of their express orders—the assessor's orders.

34 A. Yes, sir.

Q. Did you hear the receipts read this morning?

A. I did.

Q. Are those receipts the taxes that you paid for this assessment on these thimble-skeins and pipe-boxes.

A. Yes, sir.

Q. Can you state from your memory who made those payments.

(Objected to.)

Q. Do you know whom, or can you state who made those payments?

A. They were almost all of them made by me; there was perhaps three or four not made by me; there was positively two not made by me; and there was two or three others, possibly, that was made in my presence, but not by me. The checks were made by me, and the entries made by me or by my order; and the checks were written by me; and the entries made in the cash book by me; and I merely turned and told somebody else to hand the check over.

Q. The other two were made by whom?

A. By Mr. Durant, without my being present, and only two.

Q. Did your clerk have any authority, or did he ever draw checks at all?

A. Never, sir.

Q. He was in the office, and he may have handed it over?

A. Yes, sir, certainly; either by the order of Mr. Durant or myself; but he never was authorized to make any payments at all.

Q. State what steps were taken by the collector or his assistants to enforce the payment of this tax upon you.

A. Nothing more than the regular demand.

Q. A demand of what?

A. A notice and a demand of payment when the day came. The notice here this morning, was in the usual form.

Q. Is that the notice you refer to?

(Shows witness paper.)

A. Yes, sir; a copy of it, sir; that is the kind; of course, the dates are different, and the amounts.

35 Q. Is that the same paper that was shown Mr. Janes when he was on the stand?

A. I cannot say; it reads the same.

Mr. Cary offers in evidence a copy of the notice referred to.

(Objected to.)

By the COURT: Have you that notice?

A. We generally destroy them. We did not suppose there was any

necessity of keeping them; I might possibly find some in the office, but I have not any with me.

By Mr. MURPHEY: Have you examined the office with the view of finding any?

A. No, sir.

Q. Did you keep the notices, or were they thrown away?

A. They were generally thrown away; I had one in my hand accidentally within three days, but I destroyed that; I happened to come across it among some old papers, and I presume there are some others there; they read all the same way, but I could not say positively, because I had one this week, in my hand.

By Mr. CARY: We offer that in evidence, because the testimony shows that was the form of the notice that was served, simply to show the form of notice that was served.

(Objected to. Paper withdrawn for the present.)

Q. State whether any and what protests or objections were ever made by you to making these returns or paying these taxes.

(Objected to.)

A. Mr. Janes, this morning, told about the substance of what passed between me and him.

By the COURT: That is not the way to testify.

A. Well, to make my own statement, it was this: I supposed at the time that my protest must go to the assessor. I went to him and wished on one return to make a formal protest. That was our local assessor, Mr. Brand; he told me that was not necessary.

By the COURT: Go on. What occurred?

36 A. Then I wrote to the Commissioner at Washington, in the month of May, or about the first of June—it was in the month of May, 1867, before I made my returns—and I then also conferred with Colonel Bingham, and I supposed that was all that was necessary, as it was well understood that I was protesting against the payment of the taxes both at home and at Washington.

Q. That was against the assessment of the tax?

A. Yes, sir.

Q. You wrote the Commissioner that the local assessor required you to make the return?

A. Yes, sir; that is that we had been exempt for three months, and was then required to make returns.

Q. You wrote the Commissioner as to whether you were liable to pay the tax?

A. Yes, sir.

Q. Did you receive an answer from him?

A. I did.

Q. Look at that paper.

A. It is the answer, sir.

By Mr. CARY: I propose to read that in evidence.

By the COURT: Read it.

And thereupon said letter was read in evidence, as follows, to wit:

"TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
"*Washington June 13th*, 1867.

"GENTLEMEN: Your letter of June 8th, in relation to thimble-skeins and pipe-boxes has been received. You wish to know whether castings for these articles are exempt. In answer, I have to say that castings for locks, safes, looms, spinning-machines, steam-engines, hot-air and hot-water furnaces, sewing-machines, machinery, cars, and scales, and

castings made to form a part of any article upon which in a finished state, a tax is assessed and paid, are exempt from tax. Castings for thimble-skeins and pipe-boxes are not specially named in the law as being exempt; and as thimble-skeins and pipe-boxes are exempt from tax, there is no provision of law for exempting castings therefor.

37 Thimble-skeins and pipe-boxes have ever been regarded as manufactures, and prior to Mar' 1, 1867, when they were sold for more than 5 per cent. above the value of the castings composing them, they were liable to tax, independent of the tax on the castings.

"Congress by the act of Mar' 2, 1867, exempted thimble-skeins and pipe-boxes, but did not exempt castings for the same. Such castings are therefore taxable.

"Very respectfully,

"J. E. MESSMORE,
"*Deputy Commissioner.*

"DURANT, VAN ARSDALE & CO.,
Kenosha, Wis."

Q. Was it in pursuance of this letter and your instructions that you made the returns?

A. Yes, sir.

Q. State what took place relative to the payment of the tax, in regard to any objections made?

A. The exact language I cannot tell you; I do not know; I did not consider that very important; I wished Mr. Janes to understand that I protested against the assessment; the language I used, I do not remember.

Q. Can you state anything that you informed him.

A. I informed him of the course I had taken, I remember that distinctly; that is, that I had seen the local assessor; the local assessor required—that I had written to Washington, that I had now conformed with all the law required, and my next step would be to sue to recover the tax; there was one step further I took in this matter, and that was, I employed General Paine to go and visit the Commissioners' office.

Q. For what purpose?

A. To get him to show him that the tax was unjust; that we protested against it, and that his decision was wrong.

Q. That you should not be required to pay the tax?

A. Yes, sir.

Q. Of what material are thimble-skeins and pipe-boxes made?

A. Of iron exclusively.

Q. Are they not made of any other substance to your knowledge?

38 A. I have once seen a pipe-box made of brass, but I never saw a thimble-skein made of anything but iron. I saw one pipe-box made of brass.

Q. Well, the thimble-skeins and pipe-boxes upon which you returned, what were the castings they were made of?

A. Iron.

Q. Explain to the court and jury now what there is about this machine that is or can *be* by any possibility be called a manufacture.

A. This here is as it just comes from the sand.

(Objected to as immaterial. Objection overruled. Exception taken.)

Q. State in regard to the making of these thimble-skeins—how they are made, and what there is of it?

A. After they come from the sand, all we do is simply to turn these

to the proper size—turn the thread on that, and cut the nut; we have to turn that and cut the thread on and cut the thread in this; with this (pipe-box) we do nothing at all. We turn the shank to a suitable size for the thread to be cut upon it, and then cut the thread on this. We call it the knob instead of the shank.

By the COURT: What is that thing in your hand?

Mr. CARY: That is the female screw, as the commissioner calls it, and this, I suppose, is the male screw.

Q. The end of the thimble on which the thread is cut is called what?

A. We call that the knob; that is the expression we use for it, sir.

Q. This fixture that is screwed on to it to hold on the pipe-box and wheel, is called what?

A. The nut.

Q. What amount in value, ad valorem, does the turning of the knob and cutting of the thread thereon, and the thread on the nut, add to the thimble-skein and pipe or box.

(Objected to. Objection overruled. Exception taken.)

39 A. Well we never fix any amount to the box or skein; without that I cannot answer that question, and my reason is because it has no market value previous to putting that nut on and thread. That part of the casting is not sold until the thread is cut on to the skein; it has no market value.

Q. What proportion of the cost of producing the thimble-skein and pipe-box complete, is the turning of the knob on the thimble-skein, cutting the thread on it, and the thread on the nut?

A. Well, I do not know that; I am not mathematician enough to answer it; but then taking the thimble-skein and pipe-box and nut together, they cost us $4 16 per set of four. For the labor of that we pay 11 cents apiece. The entire cost was $4 16.

Mr. MURPHY: Eleven cents for cutting the knob?

A. For the whole thing—the turning of the knob and cutting the thread, and cutting the thread in the nut. The set entire of four pieces cost $4 16.

Q. The cost of turning the knob and cutting the thread on the knob and in the nut was eleven cents on the four, on the entire set?

A. Yes, sir; that is we paid eleven cents for finishing them up after they came from the sand; eleven cents a set.

Q. The set of four, as the casting came out of the sand, cost $4 03?

A. No, sir; $4 05.

Q. And the expense of turning the knob and cutting the thread and finishing up was 11 cents?

A. Yes, sir.

Q. And the whole cost four dollars and sixteen cents?

A. Yes, sir; I wish to explain this. We make somewhere about a dozen or fifteen different sizes of skeins, and this size is what we call the standard size. If a man asks me to give him the figure, I should figure it upon this size for the cost, because this is the average, and the figures which I have given here are based on this size. Some sizes cost more and some less, but this is the size we make all our fig-

40 ures on. They all cost us the same, however, for the labor and finishing up; that is all the same thing.

Q. Is there anything whatever done to the pipe-box after it comes out of the sand?

A. Nothing but cleaning it—the same as any common casting. There no labor on it.

Q. Do you sell the pipe-box separately from the thimble-skein—separate from the pipe-box?

A. Yes, sir.

(All this testimony is objected to. Objection overruled. Exception taken.)

Q. What does the thimble-skein and pipe-box made of iron of commerce mean in trade?

A. This, as it stands there, is what I call it.

Q. Finished just as it stands there?

A. Yes, sir; I never saw one formed in different shape.

Q. You mean a thimble-skein and a pipe-box completed?

A. Yes, sir; I mean finished just as this is.

Q. But you do sell them separately.

A. Yes, sir.

Q. You stated that you sometimes sell the thimble-skein separate from the pipe-box; what is it that you so sell separately?

A. This. That alone is the thimble-skein, and that the pipe-box.

Q. How long have you been in this business—the business of manufacturing thimble-skeins and pipe-boxes?

A. A little over six years.

Q. Are you well acquainted with its manufacture in the United States—that is, the business of manufacturing it?

A. Yes, sir; in a large portion of the shops.

Q. Is there any such thing known to commerce or trade as a thimble-skein which has no nut or knob or thread on it?

A. I never saw one or heard of one, sir.

Q. Regarding this as castings in three separate parts, what proportion of the castings that you returned and paid the tax on involved in this suit, would exceed 10 pounds in weight?

41 (Objected to as immaterial. Objection overruled. Exception taken.)

A. There were $57\frac{1527}{2000}$ tons that weighed under ten pounds. No, sir; I am mistaken. I will have to alter that very materially; it is 577 tons and $\frac{1275}{2000}$.

Q. Have you ever made an appeal or the appeal papers, and caused them to be transmitted to the Commissioner of Internal Revenue, to have this tax refunded.

(Objected to.)

It was admitted on the part of the defendant that before this suit was brought the plaintiffs appealed from the assessment and collection of the taxes involved in this suit to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury, established in pursuance thereof; and as evidence of the decision of said Commissioner upon said appeal, said plaintiff produced and offered in evidence two letters from the Commissioner of Internal Revenue, one to the plaintiffs, Durant, Van Arsdale & Co., and one to George Q. Erskine, collector of internal revenue for the first collection district of Wisconsin, to the reading of which said letters in evidence the counsel for defendant then and there objected, which objection the court then and there overruled, and to which ruling and decision of the court the counsel for defendant excepted, and thereupon said two letters were read in evidence as follows, to wit:

"TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"*Washington, Apr.* 29, 1870.

"SIR: Your claim for the refunding of $4,150\frac{91}{100}$ dollars has been

rejected. This office will give the collector of your district the reasons in full for the rejection of the same.

"Very respectfully,

"C. DELANO, *Commissioner.*

"Mess. DURANT, VAN ARSDALE & Co.,
"*Kenosha, Wis.*"

42 "TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"*Washington, April* 28, 1870.

"SIR: The refunding claim of Durant, Van Arsdale & Co., for $4,150 91 is rejected, for the reason that the thimble-skeins and pipe-boxes assessed in this case were clearly subject to the tax imposed and paid, as they were not made of steel.

"It is asserted that none are made of steel. If such be the fact, then none are exempt by the act of July 13, 1866.

"I especially would direct you that in case any suit is brought against you, or any other officer, for the recovery of this tax, you give me immediate notice of the fact, and inclose the same in the envelope sent under this cover, that it may be brought to my personal attention.

"Respectfully,

"C. DELANO,
"*Commissioner.*

"GEORGE Q. ERSKINE, Esq'r,
"*U. S. Coll. 1 Dis. Milwaukee, Wisconsin.*"

Cross-examination:

Q. Who are the members composing the firm of Durant, Van Arsdale & Co.?

A. Mr. Durant, myself, and Mr. Aldrich.

Q. How many of those payments did you testify you had made yourself personally?

A. Seven, I think, must have been paid by me, or by my direction, while I was in the office.

Q. Seven you now swear you paid yourself?

A. I will tell you why I swear to it. The checks were written by me, in my handwriting, and the entries were made by me in the cash-book, and that entry was never made until the cash was paid. The check may have been there, and I may have told somebody else to hand it over.

Q. Are you able to say that you made these seven payments from your memory of having paid it, or from your memory refreshed by your books.

A. By my books alone, sir.

Q. Your memory does not enable you to say?

43 A. No, sir.

Q. Might it not be true, and is it not true, that many of those checks were drawn by you in expectation of the coming of this collector, and left in the charge of your clerk to be delivered to him when he came?

A. No, sir; for the reason in that case he has got to make the entry in the cash book, and the entries are not in his handwriting. But one of these payments Mr. Durant made.

Q. Might it not be done so, and was it not done so *enough?*

A. No, sir; it was not.

Q. Then, from the examination of your cash book and those checks

in your handwriting, you want to be understood now as swearing that you made at least seven of those payments; that they were under your immediate supervision, when you were present?

A. Yes, sir.

Q. Seven of the nine?

A. I made the payments. All that were made by me are in June, August, September, October, November, December, 1867, and April, 1868.

Q. The others were not made by you or in your presence?

A. Yes, sir; the one of January or February.

Q. How much is that one of January?

A. $1,089 38.

Q. You are sure you were not present?

A. Yes, sir.

Q. Are those checks in your handwriting?

A. No, sir; Mr. Durant.

Q. Whose entry in the cash book?

A. Mr. Durant; and one of those other entries *were* entered on the cash book by my son. The check was in my handwriting, and the entry by him.

Q. How often, now, can you say from memory, and not off your books and checks, can you remember that you paid money to Mr. Janes?

44 A. I can positively remember only the first and last, and I merely remember that from the circumstance that occurred. I know I paid others, but I cannot remember anything particular in regard to them.

Q. I understood you to say that this conversation which passed between you and Mr. Janes was about as he stated it?

A. Yes, sir.

Q. When was that conversation between you and him that he has testified about?

A. My impression is it was the first payment in June.

Q. What is the amount of that?

A. $333 87. That was for three months of March, April, and May.

Q. What was that conversation between you and him?

A. Well, I cannot, as I stated before, remember the exact language.

Q. Can you give the substance of it?

A. The substance of it was that I called his attention to the fact that the tax was unjust. I had talked with the assessor here at Milwaukee, and had written to Washington; and I certainly should object to paying the tax, but I had to do it, and I suppose I had conformed to the law, and should prosecute the Government.

Q. Did you ever have any other conversation with him at the time of payments?

A. Yes; several times, both before and since this tax accrued. I never saw him only as he came to collect tax.

Q. Mr. Janes—he did not any other conversation with you?

A. I did not so understand him.

Q. I mean at the time of the payments?

A. I do not think I have seen Mr. Janes three times in my life, only at the time of payments.

Q. Are you inclined to supplement his testimony and go a little further with it?

A. Not at all.

Q. What did you understand him to swear to?

A. I understood him to swear that we had several conversations, but the wording of the language I could not state.

45 Q. He did swear so.

A. Then I have got to state that he was mistaken; but Mr. Janes has told me, since leaving, to the contrary. He is simply mistaken in memory.

Q. Well, try your memory a little. You remember this conversation in June?

A. Yes, sir.

Q. Can you remember any other conversation in that way between you at the time that any payment was made? If so, give it.

A. I cannot remember the time. Now I remember this—the words have just come to me now—and Mr Janes remarked to me once, when I told him I should make the claim back, and he replied, "I think you ought to do it, sir."

Q. When was that?

A. I cannot tell you. I know it must have been at the time of a payment, because I never saw him over three times, except those times.

Q. Did you have any conversation with him at those three times about the subject of this tax?

A. Yes, sir.

Q. Then it might have been one of those times?

A. No, sir; because then I asked what he remembered about the conversation of him.

Q. I want to enquire of y' if it is not true that you never said a word to him about recovering this tax, but only at the time of payment?

A. I have sworn to the contrary.

Q. And have you not stated to different parties, and, among others, to your counsel, that there was no protest in regard to the payment of this tax, except as transpired at the time of that one conversation?

A. What I have said to my counsel and to others was just this, that the formal protest I never considered necessary but once. Then I supposed it must be taken to the assessor, and I went to Mr. Brand with my returns, and wished to endorse it on the back of it formally, and he told me that that was not necessary, and I took it for

46 granted that that was the case.

Q. When was that?

A. That was when I made the return in January, on the $1,089. I made all the returns myself.

Q. January, 1868?

A. Yes, sir; in January, 1868. The fact of going back some nine months was the reason I wanted to make protest.

Q. Now tell us, if you had more than one conversation with him, what was said.

A. I cannot tell you only what I have already stated.

Q. You told us what was said in this first conversation, I think?

A. I told you what year in each, and then some subsequent time that he made a remark when I told him I was going to try to recover; he made the remark that I ought to recover. I can't tell the words, but I know what the main facts were, but just what he did say I cannot say.

Q. You have told about one time. Now go to the next time.

A. I have told you all I know about it.

Q. Then you don't remember of but two conversations on the subject?

A. Really I can't give no answer, but I remember of several. I know we had conversations several times. I know my feelings.

Q. I am not asking about your feelings.

A. Well, I recollect the conversation, but I can't give the language. I don't claim to be able to give it.

Q. How is it you remember the language used in that conversation in June?

A. I remember it for the simple fact that then the whole matter was up. I was fighting it. I had come here to see the assessor. I had written to Washington.

Q. After you got that letter from the Commissioner to you, *when* your cake was dough?

A. No, sir. Even then, after that I employed a man to go to Washington.

Q. Did not you conclude, after you received that letter not to
47 fight this thing any more until you heard the decision made by the court in Chicago,

A. No, sir; I had consulted with Mr. Cary and Mr. Head of Kenosha, and had also some with a party in Chicago. I went further. I went to Cleveland, to the manufacturers' convention, to consult with other manufacturers.

(Objected to.)

Q. How much does this casting weigh (pointing to pipe-box?)

A. I cannot tell you just what that weighs. I can tell you just the weight as we have them.

Q. Can you tell what the other weighs (the thimble-skein?)

A. It weighs about eleven pounds. At the time these were made a set of skeins weighed fifty pounds, but now we have reduced them, and a set weighs about 44 pounds; no, they weighed fifty pounds. Now a set of skeins and a set of boxes of that size weigh thirty pounds. They may vary a little in weight—perhaps half a pound.

Q. You mean, by a set, four?

A. Yes, sir.

Q. When this pipe was cast, was it continued at this gradual inclination to the end, or was the thread and shoulder here?

A. There was a shoulder.

Q. So that simply all that was done was to cut the thread.

A. No, sir; that is in the pattern which is two parts. The hole in the pattern is nearly as large as this entire knob, but not in molding this. We mold it in this shape, and that leaves a shoulder here, and there is perhaps the 32d of an inch turned off, so as to make it true.

By the COURT: How much does the skein and nut weigh?

A. About twelve pounds. The set of four skeins weighed fifty pounds—the whole thing.

Q. You mean to say that a full set of four boxes and skeins weigh how much?

A. Eighty pounds.

Q. What would this same casting be called without this screw cut here, or without the screw cut in the nut?

A. We call them the same name, sir; for instance, those were
48 molded in three pieces—three men's work.

Q. Would you call them the same thing before the screws were cut?

A. Yes, sir.

Q. And you say you never saw any of them in the market without the screw being cut?

A. No, sir.

Q. Would it not be a very much more proper thing to call them castings for boxes & skeins?

A. I do not know why it would.

Q. Would it not, for this reason, that you say they are never sold until the screws are cut?

A. I do not know why it is. I never have made any distinction. I did not originate the name. I found it in existence. They are certainly not completed as thimble-skeins and pipe-boxes, in the mechanical and commercial acceptation of the word, until the screws are cut upon the skeins and upon the nut. In the commercial world that pipe-box is known as it is, but the skein is not.

Q. I am asking about the whole together.

A. I do not take them that way. I say the skein is not completed, but the pipe-box is completed, but the whole together are not completed. I cannot take them altogether. We never do take them together.

Q. Now about this 577 tons; how do you figure this 577 tons of iron returned to be taxed in quantities weighing less than ten pounds?

A. I figured in this way. That during the whole time that that law was in existence, I was compelled to make an entry, in order to make my returns correct, all of our sales of each size of skeins in order to get at it. And that is the way I got that, because, by having the number of each size and knowing their weights, of course I can tell what proportion weighs less than ten pounds.

Q. Have you examined to know that your estimation of 577 tons was made up in that way.

A. Yes, sir; I examined my returns and the assessor's books.

Q. During this period?

A. Yes, sir.

Q. What were those articles of casting composed of—what
49 were they?

A. They were this; for instance, that box—that weighed less than ten pounds.

Q. Did you count this box and this nut, as a casting under ten pounds?

A. Yes, sir.

Q. Did you these?

A. I did where they came under ten pounds.

Q. Can you tell, by examination of your report, how many boxes come under ten pounds?

A. Yes, sir.

Q. Were there any of those thimble-skeins and pipe-boxes completed, as this here now, that weighed less than ten pounds.

A. Yes, sir; we have several sizes.

Q. Did you have any of these boxes that weighed less than ten pounds?

A. Yes, sir.

Q. Have you figured any of those in?

A. Yes, sir.

Q. How many have you got of that denomination?

A. I do not know without refiguring again. I took all that weighed under ten pounds.

Q. How many tons of iron have you paid taxes on during this period, composed of quantities that weighed more than ten pounds.

A. Why, the balance of that amount. The difference between 577 tons and what were made. It would take me some time to answer that question directly. I could do it if you require it. The fact is this that

in the returns of both over and under ten pounds, I have simply got the aggregate, including in there the time going back to August, 1866.

Q. You have not got the aggregate?

A. Yes, sir; I have got it, but it goes back to that time.

Q. Now what did you mean on your direct examination by saying that all those nine payments, except three or four, were made by you?

A. Why, I simply meant that.

Q. Now you think that there are three or four payments not
50 made by you?

A. There was two not made by me, and when I spoke of three or four I had reference to the fact that Mr. Janes said my clerk paid one or two; but I think I might have ordered my clerk to hand him the check for me.

Q. And then that would leave you paying only four or five out of the nine?

A. Yes, sir; if that was so. I think I must have been in the office when all but three were paid.

Q. You had the idea that the conversation you had with Mr. Janes, in June, 1867, and which you or your counsel claims, was a protest? You understood, did you not, that that was an unnecessary protest for you to make against the payment of any tax upon this kind of property?

A. I did not suppose that a protest was required of me to the collector.

Q. And that you had there supposed that protest was sufficient for all subsequent payments, as well as that?

A. Yes, sir. I did not pretend to make any formal protest to him. My conversation was merely a conversation with him.

Q. You merely grumbled, as you would to the payment of any tax?

A. No, sir; but I had taken all the steps I thought necessary to protest, aside from that.

Q. I understand you that, for producing four of these three things here combined, it cost you $4 16?

A. Yes, sir.

Q. And that they included the cutting of the screws upon the nut and on the skeins?

A. Yes, sir.

Q. Did you get these screws cut by the job?

A. We paid men by the piece. Three men performed that labor; each one has got their part, and we pay each. The cutting of the thread on skein is done by day labor—by machinery. The cutting of the thread on the nut, and the turning of the knob, is done by the piece.

Q. And you pay how much apiece?

51 A. We pay a man to-day five cents for the set; for turning the knob ready for the reception of the thread, five cents a set of four. We pay a man five cents a set for preparing the nut and cutting the thread on it, and putting it on there and facing it off. And this other costs us a little less than a cent a set. It is done by the day—by machinery.

Q. I suppose that that complex compound arrangement there could not be produced with the screws, except at a foundry where they cast iron, &'., &'.? That is a casting, is not it?

A. Yes, sir; of course that is a casting.

Q. Now, I want to enquire of you whether that screw might not be

cut upon that skein and upon this nut outside of a foundry—in a blacksmith shop, or in a shop run exclusively for the purpose of cutting screws?

A. Yes, sir; if you have got the proper machinery. It is cut in a lathe.

Q. Are there not many articles of casting that may be cast and produced in a foundry that need further and other dressing in some or other department of mechanism?

A. Yes, sir.

Q. Give us some instances.

A. Well, take an engine casting—their names are legion.

Q. Where the casting is simply made, machinery has got to be adjusted to it by other hands, *and other hands* and other style of mechanics?

A. Yes, sir. We do not call the cutting of that thread mechanical work, because we have hired boys, or any man that we could pick up. The man that cut that thread on, came in and worked for me two weeks, and cut two hundred set in a day, and yet he was not a mechanic.

Q. Do you think Mr. Cary could go right down to your shop and cut as good a screw as that right off—the first thing?

A. Yes, sir, or Mr. Murphey either; but he could not make the machinery.

JUROR: These nuts are cut by machinery?

A. Yes, sir.

52 Q. Did you cast anything else besides that kind of casting?

A. Very seldom. That is the bulk of our trade.

Q. Did you ever pay any tax on those other castings which you cast?

A. Yes, sir; we paid all that was necessary. You remember that castings for repairs were exempt.

Q. What have you been in the habit of casting besides these?

(Objected to.)

A. The amount is very small. We have now two men; and, I think, we have always kept one man.

Q. What is the general character of your other castings?

A. We kept one man for general job work.

Q. Have you been in the habit of paying taxes on your other castings?

A. Yes, sir.

Q. What is it?

A. Anything that was made.

Q. What?

A. Bolster plates.

Q. And you pay $3 00 per ton?

A. Yes, sir.

Q. Bolster plate?

A. Yes, sir.

Q. What is that for?

A. It comes on the bolster or sand-board of a wagon.

Q. Anything else?

By the COURT: We will have to interfere with this examination.

Q. That's all.

Mr. Cary offers in evidence a copy of the letter from the Treasury Department, dated May 14, 1868, from Commissioner Rollins.

(Objected to. Objection sustained. Exception taken.)

By WITNESS: Let me make one correction. I spoke of returning bolster plates. I have not returned them, because they weighed under ten pounds; and they weighed under five pounds, and I have not returned them, because it was not necessary.

Q. That's all.

And said plaintiffs, to further maintain said issue on their part, called as a witness—

GEORGE Q. ERSKINE, who, being sworn, testified as follows:

53 Q. You are collector, are you?

A. Yes, sir.

Q. Do you furnish notices to your deputies to serve upon parties who are liable to pay taxes?

A. Yes, sir.

Q. Do you fill them out at your office, and send them out?

A. We fill some of them out, and the deputies fill some of them out.

Q. Look at that paper, and see whether that is a notice such as you cause to be served for that tax.

A. Yes, sir; that is the form of the notice.

Q. That would be a copy of the notice such as you serve?

A. Yes, sir.

Q. You sent them to your deputies, and they sent them by mail?

A. Yes, sir; and sometimes we sent them by mail from our office. We do both ways.

Mr. CARY: I offer in evidence that notice, to show the form of notice used.

Q. When were you appointed collector?

A. In April, 1867.

Q. Has Mr. Janes been your deputy collector at Racine and Kenosha ever since?

A. Yes, sir.

Cross examination waived.

And thereupon the counsel for plaintiffs read in evidence the form of notice referred to in the testimony of George Q. Erskine and Lorenzo Janes; which notice was as follows, to wit:

"*Monthly notice.*

"OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
"1 DISTRICT, STATE OF WISCONSIN,
"*Milwaukee,*

"List ——.
"Div. ——.

"M . DURANT, VAN ARSDALE & CO.:

"The tax assessed against you for the month of , 18 , amounting to $, is due and payable on or before the last day of , and unless paid within that time it will become my
54 duty to collect the same, with a penalty of five per centum additional, and interest at one per centum per month. Payment may be made to L. Janes on or before , 18 , at S. T. Brand's office, in Kenosha.

"G. Q. ERSKINE, *Collector.*

"Bring this notice with you."

LORENZO JANES recalled by plaintiffs' counsel.

Q. That is the paper which you stated in your examination was the form of notice which you served?

A. Yes, sir; that is the form of all the notices which we served on them.

Cross-examination waived.

Plaintiffs rest.

Defence.

LORENZO JANES, recalled by counsel for defendant.

Q. Have you heard the testimony of Mr. Van Arsdale this afternoon.

A. Yes, sir.

Q. I want to know if I understood you right, on the stand before, when I understood you to say you had no conversation, or more than one conversation with Mr. Van Arsdale about this tax.

A. I have no recollection of but one, previous to the commencement of this suit.

Q. You have talked with him about it since?

A. I have had one or two conversations since, but I do not recollect of but one conversation with him in reference to the payment of this tax before that, and then he went into the full explanation.

Q. He says he thinks that conversation was at the time of the June payment; have you any recollection about it?

A. I cannot say. I said before that I could not tell, and I cannot now, at which of the payments it was that he made these objections. I have no means of knowing nor do I recollect.

55 Q. I want to know also, how many times Van Arsdale personally made payment to you of this tax?

A. I cannot state. I know that he has made me them and I recollect his partner handed me a check for the tax at their office, but whether he was present behind the counter, or the little division there, I do not know. There is a rail up, and he might have been behind, but I don't recollect of having any conversation with him; it is possible he may have said something to me more than once, but I do not recollect of his making the objection but once, but I recollect his partner making some remarks at one or two other times.

Q. You think then that his clerk handed you the checks for those taxes at more than one time?

A. I recollect twice, that the clerk handed me the receipt for the tax. He did not draw the receipt—the clerk did not.

Q. You mean checks, don't you?

A. Yes, sir; I mean checks. The reason that I recollect it is, I recollect of calling more than once for the tax and the parties would be out, perhaps, and I saw the clerk, and then I would call after dinner and get the amount of the tax, and the check would be ready for me.

Q. You remember two occasions when you received the check from the clerk, and Van Arsdale was not present?

A. I think I do. The checks were drawn already and he handed them to me. The amounts had been previously sent to him in the notice, and he knew the amount before I called.

Q. If there had been any other subsequent conversation between you and Van Arsdale, in substance the same as the first, wherein he threatened to recover the tax back if he could, you would be likely to remember it?

A. I think so. I think I should.

Q. Did you make any memorandum of the protest made by Mr. Van Arsdale at that time?

A. No, sir.

Q. Why didn't you?

56 A. I did not understand he was making a formal protest by making an objection to the payment of the tax, stating his objection to the payment.

Q. Was that objection any different; and if so, what was the difference?

By the COURT: You have asked that before.

Cross-examination.

Q. You did not understand him as saying he used the word protest, or if he made a formal protest?

A. That is what I mean or what I meant to state.

Q. But you did understand from him that he was objecting to the tax and that he was paying it only because he was compelled to?

A. I understood him to say that the tax was unjust.

Q. You understood him to say that the tax was unjust?

A. He said that the Government had decided that he must pay it, and that the assessor had assessed the tax, and that he would pay it.

Q. And that he should institute proceedings to recover it back?

A. Yes, sir.

Mr. MURPHY: I do not understand. You say that he used the word protest, and then you did not understand that he meant to make a formal protest. Did you understand that he was making such a protest with a view of complying with the law before bringing a suit?

A. No, sir; I did not understand that he made the protest with the view of bringing a suit.

Mr. CARY: But you did understand that he proposed to bring a suit?

A. He said so.

Q. That 's all.

Mr. Murphy offers in evidence a letter dated August 29th, 1870, signed by J. W. Douglas, Acting Commissioner of Internal Revenue, to G. W. Hazelton, United States district attorney for this district.

(Objected to.)

57 By the COURT: I do not know whether it is proper to be as evidence itself. If there is anything in it, we will allow him to read it as a matter of argument to the court—as a matter of law.

The offer of the letter as evidence is withdrawn.

Defendant rests.

Testimony closed.

And thereupon the court charged the jury as follows:

Judge's charge.

By the act approved March 2nd, 1867, sec. 11, thimble-skeins and pipe-boxes made of iron are exempted from taxation. These articles are exempt whether cast or wrought, and no tax could legally be assessed after the approval of that act.

The internal revenue laws having prohibited a suit on the part of the taxed citizen to restrain the collection of a tax illegally assessed—an illegal tax, paid under notice of the collector to pay or be subject to a penalty. An action may be maintained against the collector, on the part of such person so paying to recover back the illegal tax so demanded.

In order to maintain such action it is not necessary that a formal protest in writing or otherwise should be made against such payment at the time of each payment of a tax of the same nature.

If the collecting officer had notice at the time of a payment from the taxed person that the tax was illegal and that he would take measures to recover it back the action may be maintained for all the taxes paid.

If the jury find for the plaintiff you may add interest to the amount paid from the time of each payment.

The defendant's counsel excepted on the trial to each and every instruction and proposition given by the court to the jury, separate-
58 ly, severally, and distinctly; and also asked the court to give the following instructions to the jury on behalf of the defendant, to wit:

The defendant asks the court to instruct the jury as follows:

1. In this case it appears from the evidence that the property of the plaintiff was not levied upon by the tax collector, nor sold by him by virtue of his tax warrant; and the plaintiffs seek to recover upon the ground of a protest made by them, and which they claim is a sufficient evidence of compulsory payment to warrant the maintenance of this action, so far as that point is concerned. Now a mere unwillingness to pay or an allegation by the tax-payer that the tax is a steal or other analogous words, followed by an actual payment of the tax, is not a sufficient protest; but the errors complained should be pointed out with reasonable certainty to the collector, and a distinct notification given to him at the time of each payment, to recover which the action is brought, that he will bring an action to recover back the money so paid.

2. The plaintiffs can only recover in any event the amount of any tax so paid, under protest as above described, made at the time of the payment; and if any portion of the nine payments were made without protest by the plaintiffs at the time, no recovery can be had as to such payments.

3. The law imposes a tax of $3 00 per ton on castings in their crude state, as the same comes from the foundry, but by the cutting of screws upon skeins and nuts, as described by the witness, a mechanical change is wrought in the castings, and the skein, nut, *a* box form a combination and represent an article of manufacture denominated by the law:
"Thimble-skeins and pipe-boxes." This latter combination, at
59 the time the alleged cause of action accrued to the plaintiffs in this suit was subject to an ad valorem tax of five per centum, if the mechanical change increased the value of such castings five per cent. ad valorem; and if not so increased in value the same was exempt; this ad valorem tax has since been repealed. But it is not material for you to consider in this case either the present or former state of the law as to the ad valorem tax, since this suit is not brought to recover back, and no ad valorem tax appears to have been assessed upon the plaintiffs goods or paid by them.

4. The act imposing the $3 per ton tax on castings was passed and approved June 30th, 1864. There have been several supplementary and amendatory acts to this law, passed by the Congress; but none of these amendatory or supplemental acts have repealed the provisions of the law of June 30th, 1864, imposing the $3 00 per ton tax on castings, such as are described in the declaration; at least no such acts were passed till long after the accruing of plaintiffs' alleged cause of action.

5. The evidence in this case shows that no legal protest was in fact made as to any of the payments of taxes made by the plaintiffs and you must therefore find for the defendant.

These castings after undergoing the mechanical change described by cutting the screws on the skeins and nuts, become manufactured articles, whether the change involves an increase of five per centum ad valorem or not, and regardless of whether the articles when so changed become liable to pay an ad valorem tax of five per centum or not.

Which said instructions and each of them the said court did then and there refuse to give to said jury, to which refusal, ruling, and decision of the court the defendant, by his counsel, did then and there except, and did except as to such refusal as to each of the instruc-
60 tions so asked and refused by the court separately and severally.

And inasmuch as the said several matters so produced and given in evidence on the part of the said defendant, and by his counsel aforesaid, objected and insisted on as a bar to the action aforesaid do not appear by the record of the verdict aforesaid, the said counsel for the said defendant did then and there propose their aforesaid exceptions to the opinion, charge, and instructions of the said court, and requested said judge to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said defendant as aforesaid, according to the form of the statute in such case made and provided, and to the rules and practice of the said circuit court. And thereupon the said judge, at the request of said counsel for the said defendant, did put his seal to this bill of exceptions pursuant to the aforesaid statute, rules, and practice, on the 8th day of December, A D. 1870.

A. G. MILLER. [SEAL.]

Whereupon a writ of error and citation issued, and a copy of said writ of error lodged for defendants in error.

61 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file, and remaining of record in my office, being a full & complete copy of the record & proceedings in the case of George T. Van Arsdale, et al., vs. George Q. Erskine, collector, int. rev. 1st dist. Wis., as a return to the writ of error hereto annexed.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court at the city of Milwaukee, in said eastern district of Wisconsin, this twenty-ninth day of December, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the said United States the ninety-fifth.

[SEAL.] EDWARD KURTZ, *Clerk.*

62 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United

States of America for the eastern district of Wisconsin, before you, between George T. Van Arsdale, Alvin F. Durant, & Benjamin F. Aldrich, plaintiffs, and George Q. Erskine, collector int. rev., 1st dist., Wis., defendant, a manifest error hath happened to the great damage of the said George Q. Erskine, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, the eighth day of December, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

EDWARD KURTZ,
Clerk U. S. Circuit Court East'n Dis. Wis.

(Indorsed:) Filed December, 8, 1870. Edward Kurtz, clerk.

63 [SEAL.] The United States of America to George T. Van Arsdale, Alvin F. Durant, & Benjamin F. Aldrich, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America for the eastern district of Wisconsin, wherein George Q. Erskine, collector of internal revenue for the first collection district, in the State of Wisconsin, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

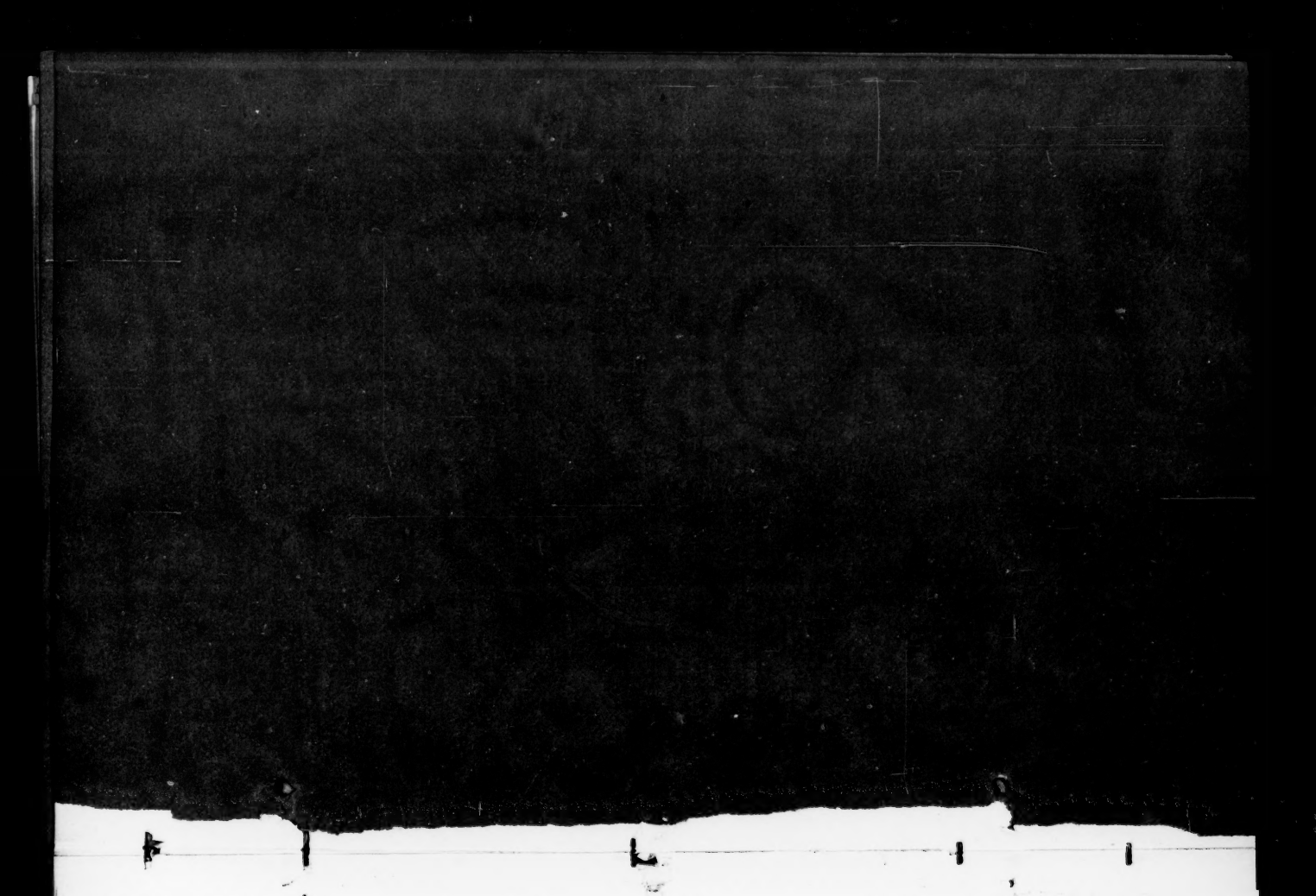
Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this eighth day of December, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the 95th.

A. G. MILLER,
District Judge.

We accept service of above citation this 9th day of December, A. D. 1870.

JOHN W. & A. L. CARY,
Pl'ff's Att'ys.

(Indorsement on cover:) No. 457. George Q. Erskine, collector of internal revenue, plaintiff in error, vs. George T. Van Arsdale, Alvin F. Durant, and Benjamin F. Aldrich. E. Wisconsin C. C. U. S. Filed 4th January, 1870.



In the Supreme Court of the United States.

DECEMBER TERM, 1871.

GEORGE Q. ERSKINE, *Collector of Internal Revenue for the First Collection District of Wisconsin, Plaintiff in Error,*
vs.
GEORGE T. VAN ARSDALE, ALVIN F. DURANT, AND BENJAMIN F. ALDRICH.
} No. 241.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

GEORGE Q. ERSKINE, *Collector of Internal Revenue for the First Collection District of Wisconsin, Plaintiff in Error,*
vs.
GEORGE T. VAN ARSDALE, ALVIN F. DURANT, AND BENJAMIN F. ALDRICH.
} No. 241.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action of assumpsit brought by the defendants in error against the plaintiff in error to recover back the amount of certain internal revenue taxes claimed to have been illegally assessed and collected. It was commenced in the circuit court for Milwaukee county, Wisconsin, on the 5th of July, 1870, and thence removed into the United States circuit court for the eastern district of Wisconsin.

The declaration contains two counts, besides the common counts for work and labor, &c. The first count alleges that theretofore, to wit, from March 1, 1867, to April 1, 1868, at Kenosha, in said district, the plaintiffs, being manufacturers of thimble-skeins and pipe-

boxes from cast iron, had manufactured a large quantity, to wit, $934\frac{112}{2000}$ tons of cast-iron thimble-skeins and pipe-boxes, &c.; that the defendant during that time, and at the time of the payments hereinafter mentioned, was collector of internal revenue, &c.; that the assessor for the district assessed on said plaintiffs, in respect to the said thimble-skeins and pipe-boxes so manufactured by them as aforesaid, a pretended tax, to wit, of $3 per ton, which amounted to the sum of $2,802 17, &c.; that the plaintiffs protested against the imposition and payment of the tax; that they were compelled to and did pay the same to the defendant under protest, which payment was made at certain times and in certain sums (the times and sums being nine altogether) as therein specified; that the plaintiffs afterwards made an appeal to the Commissioner of Internal Revenue, according to the provisions of law and the regulations of the Secretary of the Treasury in pursuance thereof, &c.; that the Commissioner, on or about the 28th of April, 1870, decided the appeal adversely to the plaintiffs, &c.; "by means of which said several premises the said defendant then and there became liable to reimburse and pay back to said plaintiffs the said sum," &c. The second count is similar to the first, omitting only the number of tons manufactured and the rate of tax per ton.

Defendant pleaded the general issue, and the parties then went to trial, which resulted in a verdict for plaintiffs for $3,372 58, in whose favor judgment was accordingly rendered therefor, with costs, on the 29th of November, 1870.

A bill of exceptions was taken, which apparently sets out the entire testimony given in the case, and presents the judge's charge to the jury, together with the instructions asked by the defendant and refused by the court. (Record, pages 13 to 39.) The defendant excepted to each and every instruction given to the jury by the court, and also to the rulings of the court in refusing those instructions which were asked by the defendant.

FIRST ERROR.

The court charged the jury: "By the act approved March 2, 1867, section 11, thimble-skeins and pipe-boxes made of iron are exempted from taxation. These articles are exempt whether cast or wrought, and no tax could legally be assessed after the approval of that act." This instruction, in view of the evidence submitted, was calculated to mislead the jury, and was in other respects erroneous.

It is true, that by the act of 1867 (14 Stat., 477) "thimble-skeins and pipe-boxes, made of iron," were exempt from duty. But this must be understood to mean those articles in their finished or completed state; and the evidence given to the jury showed plainly that the tax collected from the plaintiffs, and sought to be recovered back, was not assessed upon the articles named in their completed or finished state, but upon iron "castings" made for the same. (See testimony of Mason, Record, pages 21, 22; the collector's receipts, *ibid.*, pages 15 to 18; and see, also, Van Arsdale's testimony, *ibid.*, pages 24 to 27, and letter of Deputy Com-

missioner, *ibid.*, page 24.) Thimble-skeins and pipe-boxes, as the evidence went to show, are made from castings; in other words, castings for thimble-skeins and pipe-boxes undergo a process of manufacture before they become those articles in a completed or finished state. (Record, pages 33, 34.) It was upon the crude castings only that the tax was levied.

The 94th section of the act of June 30, 1864, (13 Stat., 268,) imposed a duty of $3 per ton on "castings of iron exceeding ten pounds in weight for each casting, not otherwise provided for." This duty was increased to $3 60 per ton by virtue of the 5th section of the amendatory act of March 3, 1865, (13 Stat., 483.) The amendatory act of 1866, however, provided that "castings of iron, not otherwise provided for," should be taxed $3 per ton, (14 Stat., 131.) This included iron castings of *every description*, except the following, viz., 1st, castings for iron bridges; 2d, malleable-iron castings; and 3d, castings made specially for locks, safes, looms, spinning machines, steam engines, hot-air and hot-water furnaces, and sewing machines, not sold or used for any other purposes, &c.; all of which were exempted from duty by the same act, (14 Stat., 148, 149.) Accordingly, under the act of 1866, castings for thimble-skeins and pipe-boxes were subject to a duty of $3 per ton; and this duty remained undisturbed by the act of 1867, and continued in force during the period for which the tax in this case was assessed.

Clearly the court erred in charging the jury that no tax could legally be assessed after the approval of the act of 1867.

SECOND ERROR.

The court erred in refusing the second instruction asked by the defendant, viz., that the plaintiffs could in any event only recover the amount of any tax paid under protest made at the time of payment, and that if any of the several payments were made without protest at that time no recovery could be had as to such payments; and in instructing the jury that "if the collecting officer had notice at the time of a payment from the taxed person that the tax was illegal, and that he would take measures to recover it back, the action may be maintained for *all the taxes paid*."

The internal revenue laws contain no express provision concerning protest. But it is settled that when a party voluntarily pays duties or taxes illegally or erroneously assessed, the law will not afford him redress; yet, if he pays the same under protest, a suit to recover them back may be brought. (City of Philadelphia *vs.* The Collector, 5 Wall., 732.) To exclude the idea of a voluntary payment, the protest should be made at the time of the payment; otherwise an objection previously urged by the person paying may be regarded as waived. A protest cannot operate retrospectively; and it can have no prospective application to the payment of similar assessments, at least unless it is in positive and distinct terms declared to be so applicable by the party protesting, when the same is made. If there is in this case sufficient evidence of a protest on the part of the plaintiffs at the time any one of the payments mentioned in the declaration was made by them,

we deny that there is any proof whatever showing that such protest was intended to apply or did apply to any other of those payments. No reason exists for supposing that such other payments were not made voluntarily by the plaintiffs; and, if so made, they certainly could not recover as to them.

GEO. H. WILLIAMS,
Attorney General.

C. H. HILL,
Assistant Attorney General.